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WERNER K. HARTENBERGER

DIRECT DIAL NO.

857-2630

May 17, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Response to Advanced Cordless
Technologies, Inc.'s Consolidated Reply To
Oppositions To Petitions For Reconsideration -
GEN Docket 90-314, ET Docket 93-266

Dear Mr. Caton:

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby submits this letter in response to Advanced Cordless Technologies, Inc.'s ("ACT") Consolidated Reply To Oppositions To Petitions For Reconsideration ("Reply"). ACT's Reply follows its Petition For Reconsideration filed on March 7, 1994, and repeats allegations of improper ex parte contacts with Commission staff by each of the pioneer preference holders and PCS Action, an organization in which the preference holders are members. ACT's most recent submission contains gross distortions of fact regarding Cox's actions in the above referenced proceedings. Specifically, ACT's untimely pleading misrepresents the nature and extent of Cox's ex parte contacts and adds new material to the record not previously raised by ACT or any other participating party.^{1/} Cox, therefore, requests leave to file this letter to clarify the record.

In an effort to bolster its unfounded and unsubstantiated allegations of improper ex parte contacts in respect to the grant of broadband Personal Communications Services ("PCS") pioneer preferences to Cox, American Personal Communications, Inc. and Omnipoint Communications, Inc., ACT has called into question the integrity of the Commission's staff in its adherence to the ex parte rules and

^{1/} Cox filed its Opposition to Petitions For Reconsideration on April 21, 1994. As to Cox, therefore, ACT's Reply is untimely filed pursuant to Commission Rule 1.429(g).

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Page 2

has expanded its previous mischaracterization of Cox's participation in the Commission's decision-making process with wanton disregard for accuracy. Although Cox will not repeat arguments set forth in its Opposition to Petitions For Reconsideration filed on April 21, 1994, the blatant inaccuracies ACT has introduced into the record, at this late date, cannot go unchallenged.^{2/}

COX'S CONTACTS WITH THE COMMISSION

ACT's most recent submission purports to list, and graphically depict, each time Cox had contact with the Commission, either by written or oral presentation, as a basis for its claim that improper ex parte contacts occurred in the course of the Commission's PCS and pioneer preference review proceedings. ACT's assertions, however, are deliberately misleading in that: (1) certain Commission contacts identified by ACT were repetitively and inappropriately attributed to the preference holders; (2) other presentations identified as "improper" consisted of detailed written submissions to the Commission that, by their very nature, could not constitute improper ex parte contacts; and (3) the remaining contacts were proper oral presentations made in the context of non-restricted proceedings, as Cox has previously demonstrated. The effect of ACT's compilation of "contacts" is to suggest a far greater number of meetings with and presentations to the Commission staff than actually occurred, and a mischaracterization of their propriety.

One of ACT's blatant attempts at distorting the record of these proceedings involves its treatment of permissible ex parte contacts made by PCS Action, an organization representing a number of entities sharing a common vision of PCS, including the broadband PCS preference holders. In its submission, ACT attributes PCS Action written submissions and contacts both to PCS Action and individually to each of the preference holders, giving the illusion of many more preference holder contacts than the record supports. For example, contrary to ACT's representations, Cox did not meet individually with the Commission staff on March 10, 1993, May 25, 1993, June 11, 1993, or July 8, 1993 on any matter in the PCS (90-314) or Pioneer Preference (Docket 93-266) proceedings. Having ignored PCS Action's statements to the contrary, however, ACT consistently has characterized PCS Action contacts as improper ex parte contacts on behalf of the preference holders.^{3/}

^{2/} Parties to the proceedings previously received copies of Cox's Opposition. A copy of Cox's Opposition to Petitions For Reconsideration is attached for interested non-parties.

^{3/} See attached Letter to William F. Caton, Acting Secretary, Federal Communications Commission, from Ronald L. Plessner, Counsel for PCS Action, Inc., filed April 21, 1994.

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In addition, Cox's contacts identified to have occurred on July 28, 1993 and September 28, 1993 consisted of written submissions to the Commission in non-restricted proceedings that did not relate to the merits of the pioneer preference awards. For instance, the July 28 submission addressed Bellcore's proposal to assign the NXX codes within the 500 service access code to certain companies expressing an urgent need for the number assignments. It had nothing to do with the Commission's pioneer preference awards. Similarly, the September 28, 1993 written submission addressed the issues of market size and spectrum allocation for PCS pioneer preference holders -- issues that properly could be commented upon pursuant to the Commission's inquiry. Even so, Cox served parties opposing its preference with a copy of the letter. Contrary to ACT's deliberate implication, therefore, Cox's submissions were both proper and adequately disclosed. There is simply no excuse for representations to the contrary.^{4/}

Moreover, Cox's contacts with the Commission on November 3, 1993, November 4, 1993 and November 10, 1993 involved only issues raised by a Notice of Proposed Rulemaking ("Notice") released by the Commission on October 21, 1993.^{5/} The Notice specifically solicited comments on the continuing need for a preference program in a non-restricted proceeding. Although discussions concerning the merits of the pioneer preference awards were prohibited, discussions regarding the possibility and consequences of retroactively applying modified preference rules were unquestionably permitted. The fact that Cox, a pioneer preference designee, might have strong opinions on these issues is hardly a surprise. Cox's meetings dealt with the specifics of the non-restricted aspects of the rulemaking, as reflected in its comments and reply comments filed in this proceeding.

The remaining meetings cited by ACT involved discussions on issues that were raised in the non-restricted portion of GEN Docket 90-314. ACT's rhetorical questions regarding the content of these discussions offers no basis for challenging the appropriateness of Cox's contacts. In fact, ACT makes the untenable suggestion that because "there were a lot" of contacts, APC, Cox and Omnipoint "are being less than candid and forthright" --- a speculative allegation unsupported by the record and devoid of merit.^{6/}

4/ ACT further distorts these written presentations by listing every Commission staff person carbon copied on these letters as a separate "presentation."

5/ See Review of Pioneer's Preference Rules, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993).

6/ Interestingly enough, in its Reply, ACT repeatedly questions the propriety of the number of contacts made by the three preference holders. It fails, however, to recognize that informal contacts between agencies and the public are the "bread and butter" of the
(continued...)

In addition to these explicit misrepresentations, it is equally offensive for ACT to organize its presentation in a manner clearly intended to mislead the Commission as to the number of ex parte contacts at issue. Because ACT outlined the dates upon which contact was made with each Commission representative, regardless of whether one meeting involved a number of individuals, and, as noted above, multiplied the preference holders' contacts through its repetitive treatment of PCS Action's activities, it appears that many more meetings with Commission staff were held than is in fact the case. ACT even broke out carbon copies of written submissions for each Commission staff person to suggest an inflated and wildly exaggerated number of ex parte contacts on behalf of Cox, APC and Omnipoint.

THE COMMISSION'S EX PARTE RULES

Finally, for the first time in its Reply to Oppositions to Petitions For Reconsideration, ACT attacks the Commission's policies of incorporating restricted and non-restricted issues within a single proceeding.^{7/} ACT raises this issue almost two years after the Commission announced the bifurcated treatment of rulemaking and preference issues in GEN Docket No. 90-314, and after numerous Commission reiterations of the ex parte rules as they apply to such a proceeding.^{8/} ACT's

6/ (...continued)

process of administration and are completely appropriate if they do not frustrate judicial review or raise serious questions of fairness. See Home Box Office v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977). In fact, informal public contact directly results in informed Commission decision-making. Also unaddressed is the fact that each ex parte contact identified by ACT was published in the docket history of the Commission proceedings. No attempt, therefore, was ever made to conceal the number or nature of Cox's ex parte contacts.

7/ See Ex Parte Rules, 2 FCC Rcd 3011, 3014 (1987) (recognizing that legitimate interests may be pursued as long as ex parte communications do not go to the merits or outcome of a restricted proceeding); Rules Governing Ex Parte Presentations, 1 FCC 2d 49, 59 (1965) (same).

8/ See First Report and Order, Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, GEN Docket No. 90-217 (released May 13, 1991); Notice of Proposed Rulemaking and Tentative Decision, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, ET Docket No. 92-100 (released August 14, 1992); Tentative
(continued...)

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arguments are more properly considered as comments in the ongoing proceeding to revise the pioneer preference rules prospectively. ACT's contrary views on the propriety of the Commission's current rules notwithstanding, the Commission and participants in the process were and are able to distinguish between restricted and non-restricted matters.

While there is no reason that the Commission could not have chosen in its pioneer preference rules to separate the restricted elements of the rulemaking from the non-restricted elements, ACT's insistence on this approach truly elevates form over substance. Commission staff and parties interested in engaging in improper conduct would hardly be dissuaded by the adoption of an additional docket number. ACT provides no basis for attacking the Commission's long-standing ex parte policies as applied to the Commission's preference program, other than to again express its displeasure over its perceived unfair treatment at the hands of the Commission.

8/ (...continued)

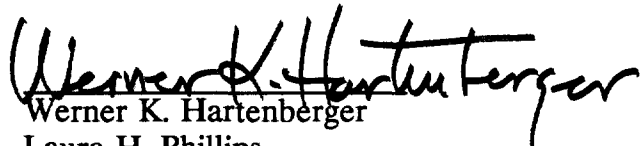
Decision and Memorandum Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 (released November 6, 1992); Public Notice, Ex Parte Presentations Relating to 2 GHz Personal Communications Services' Preference Requests, GEN Docket No. 90-314 (released February 12, 1993); Notice of Proposed Rulemaking, Review of the Pioneer's Preference Awards, ET Docket No. 93-266 (released October 21, 1993).

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Should the Commission consider ACT's untimely Reply in deliberating on the ex parte issues recently raised in these proceedings, Cox respectfully requests that these corrections to the record be included and considered by the Commission.

Respectfully submitted,

COX ENTERPRISES, INC.

A handwritten signature in black ink, appearing to read "Werner K. Hartenberger", is written over the printed name.

Werner K. Hartenberger
Laura H. Phillips
Richard S. Denning

Counsel for COX ENTERPRISES, INC.

cc (w/o enclosure): Parties in GEN Docket No. 90-314
and ET Docket No. 93-266

cc (w/enclosure): The Honorable John D. Dingell, Chairman
U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the Committee on Energy and Commerce

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of

Amendment of the Commission's)	GEN Docket No. 90-314
Rules to Establish New)	RM-7140, RM-7175, RM-7618
Personal Communications)	
Service)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Cox Enterprises, Inc. ("Cox"), by its attorneys, submits herewith its Opposition to certain petitions which seek reconsideration of the Third Report and Order in the above-captioned proceeding.^{1/}

I. INTRODUCTION

The Third Report and Order awarded Cox a pioneer's preference for a personal communications service ("PCS") license "...for its development and demonstration of PCS/cable plant interface technology and equipment that results in a spectrum-efficient application for PCS

1/ Third Report and Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket 90-314 (FCC 93-550), adopted December 23, 1993, released February 3, 1994 ("Third Report and Order"); see Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992) ("Tentative Decision"); Second Report and Order, 8 FCC Rcd 7700 (1993) ("Second Report and Order"); Report and Order, Establishment of Procedures to Provide a Preference, GEN Docket 90-217, 6 FCC Rcd 3488 (1991) ("Pioneer's Preference Report and Order"), recons. Memorandum Opinion and Order, 7 FCC Rcd 1808 (1992), further recons. Memorandum Opinion and Order, 8 FCC Rcd 1659 (1993). Notice of Proposed Rule Making, Review of the Pioneer's Preference Rules, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993).

services."^{2/} Although a number of parties sought reconsideration of the Third Report and Order,^{3/} none of those petitions challenged the Commission's evaluation of the obvious merits of Cox's pioneer's preference request and its conclusion that Cox's innovative adaptation of cable plant for PCS use fully satisfied the criteria for a pioneer's preference. Rather, the petitioners generally urged that their proposals merited preferences in addition to, but not instead of, the preference granted to Cox.^{4/}

Indeed, the only challenge to that award was filed by ACT. ACT did not contest the Commission's conclusion that Cox's unique cable/PCS technology merited a pioneer's preference. Instead, it merely echoed claims of alleged ex

2/ Third Report and Order at par. 1. The Third Report and Order also granted pioneer's preferences to American Personal Communications and Omnipoint Communications, Inc.

3/ Petitions for reconsideration were filed by Advanced Cordless Technologies, Inc. ("ACT"), Advanced Mobilecomm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. ("AMT/DSST"), Ameritech, Corporate Technology Partners ("CTP"), Nextel Communications, Inc., Personal Communications Network Services of New York, Inc., Qualcomm Incorporated and Spatial Communications, Inc.

4/ Significantly, all but one of the parties which commented adversely on the Commission's tentative decision to award Cox a preference (GTE, PacTel, Cable USA, Satcom, Inc., Time Warner Telecommunications, Inc., Cablevision Systems Corporation and Pacific Bell) did not seek reconsideration of the Third Report and Order. Only CTP filed a petition for reconsideration, and its arguments addressed its claim for a preference, not any substantive errors in the grant of a preference to Cox.

parte rule violations already made by Pacific Bell,^{5/} and fully rebutted by Cox,^{6/} asserting that these purported violations warranted rescission of Cox's preference. ACT's repetition of Pacific Bell's charges does not transform a meritless assertion into something worth considering, and affords no basis whatever for rescinding Cox's pioneer's preference.

II. COX'S CONTACTS WITH THE COMMISSION WERE FULLY CONSISTENT WITH, AND DID NOT VIOLATE, THE EX PARTE RULES.

Although the bulk of its reconsideration petition attacks the Commission's denial of ACT's own request for a pioneer's preference^{7/} as well as the FCC's pioneer's preference policies in general, ACT also argues that the pioneer's preferences granted to Cox and others were the product of impermissible ex parte contacts and must be rescinded. ACT's claims are admittedly based solely upon

5/ Letter to Andrew S. Fishel from Michael K. Kellogg (January 26, 1994).

6/ Letter to Andrew S. Fishel from Werner K. Hartenberger (February 4, 1994). Although ACT's petition includes copies of Pacific Bell's initial complaint and its reply, it conveniently omits Cox's letter in opposition. A copy of Cox's letter is appended in Attachment A and incorporated herein by reference. That letter's arguments thus will not be repeated here but will only be summarized.

7/ The Commission denied ACT's pioneer's preference request in its First Report and Order, GEN Docket No. 90-314 and ET Docket No. 92-100, 8 FCC Rcd 7162, 7176 (1993). To the extent ACT seeks reconsideration of that action, its request is obviously untimely.

rumor,^{8/} and its supplementary hysteria fails to support the action it requests.

Indeed, ACT's charges do little more than reiterate those already made by Pacific Bell and fully rebutted by Cox. Briefly, as set forth in Attachment A, the Commission expressly determined that its general PCS rulemaking proceedings were non-restricted for purposes of the ex parte rules and that ex parte presentations related to general policy issues were subject to "permit but disclose" requirements. The Commission distinguished general policy issues from the specific issues which might be raised by formally opposed pioneer's preference requests, characterizing the latter type of proceedings as restricted, in which ex parte communications are impermissible.

ACT acknowledges the Commission's specific permission for ex parte contacts with respect to the non-restricted aspects of PCS proceedings. It claims, however, that the distinction the Commission made was "deceptive and not real". ACT Petition at 22. This objection^{9/} to the

^{8/} ACT Petition at 20.

^{9/} If ACT sincerely believed that the Commission and those it regulates were incapable of respecting the distinction between restricted and non-restricted aspects of PCS proceedings, it should have brought the matter to the Commission's attention in a timely fashion so that the matter could have been resolved before contacts occurred. That ACT failed to do so emphasizes that its argument is a mere makeweight to delay implementation of the unique aspects of PCS technology and service proposals covered by the preferences at issue.

Commission's judgment about the ability of its staff and those it regulates to behave honestly and fairly has no basis in fact:^{10/} ACT submits nothing to establish that any of Cox's actions in this matter failed to comply with the Commission's ex parte rules.

In its contacts with the Commission, Cox rigorously observed the distinction between non-restricted and restricted proceedings. Its permissible ex parte presentations to the Commission were limited to emphasizing its established position on general PCS policy issues, as reflected in its written comments. Such presentations are clearly contemplated and permitted by the Commission's ex parte rules and policies. Indeed, the Commission and its staff would not have tolerated any attempt to cross the bright line which separates permitted from prohibited presentations. ACT submits nothing to support its baseless attacks upon the integrity of Cox and the Commission personnel it contacted.

Stripped of its rhetoric, ACT's claim is limited to the charge that the Third Report and Order was preceded by an unusually high number of ex parte presentations.

10/ See Report and Order, Ex Parte Communications and Presentations in Commission Proceedings, GEN Docket No. 86-225, 2 FCC Rcd 3011 (1987), statement corrected, Order, 3 FCC Rcd 3995 (1988); Report and Order Ex Parte Communications, Docket No. 15381, 1 FCC 2d 49 (1965); Memorandum Opinion and Order, American Television Relay, Inc., 9 FCC 2d 1004 (1967); cf., Memorandum Opinion and Order, Robert J. Butler, 6 FCC Rcd 5414 (1991).

Although this charge is in any event without merit, it is simply irrelevant to Cox. ACT's own information indicates that Cox made few ex parte presentations to the Commission in the PCS proceedings. The chart included in ACT's Appendix D indicates that Cox made 8 of the 121 total listed contacts;^{11/} none are listed in November or December of 1993. ACT's Appendix E includes notices of six additional ex parte contacts during November, 1993, not listed in its Appendix D.^{12/} In other words, ACT's own showing indicates that Cox made a total of 14 ex parte presentations in the two year period under study, clearly not an unreasonable number given the importance and complexity of the issues presented by the proceeding.

The record also disproves ACT's assumption that the number of contacts controlled the results of the pioneer's preference decisions. Review of the public notices of ex parte contacts since January 1, 1992, in GEN Docket No. 90-314 and ET Docket No. 93-266 indicates that a number of unsuccessful pioneer's preference applicants made approximately the same number as or more ex parte presentations than Cox. For example, US West made

^{11/} Including three noticed on August 18, 1993.

^{12/} The last such contact occurred on November 10, 1993, six weeks before the Third Report and Order. ACT's claims concerning heavy last-minute lobbying are simply inapplicable to Cox.

approximately^{13/} 16 ex parte presentations; Time Warner made nine; Bell Atlantic made 18; PacTel (or Pacific Telesis) made 22; Pacific Bell made nine; and Ameritech and Southwestern Bell each made seven. ACT also made an ex parte contact. Obviously, the number of ex parte presentations made was, as it should be, irrelevant to the ultimate outcome of the proceedings.

In sum, Cox's ex parte presentations to the Commission were limited to issues presented by the non-restricted aspects of PCS proceedings and were fully in compliance with the Commission's general ex parte rules and their specific application to PCS matters. ACT's attacks on the integrity of the Commission and of Cox with respect to ex parte violations have absolutely no factual support and provide no basis for reconsideration of the Third Report and Order's grant of a pioneer's preference to Cox.

III. THE COMMISSION'S TREATMENT OF COX'S SPECTRUM PROPOSALS CONFORMED TO APPLICABLE REQUIREMENTS

Like ACT, AMT/DSST's petition seeks reconsideration of the Third Report and Order's denial of its own pioneer's preference request; it does not challenge the Commission's substantive conclusion that Cox merited the

^{13/} The statistics in the text are based upon a review of Commission Public Notices reporting ex parte presentations in various Commission proceedings. To the extent additional presentations may have been made which were not the subject of Public Notices, see 47 C.F.R. § 1.1206(a)(4), Note 1, the above statistics may understate the actual number of ex parte presentations which were made.

preference it was awarded. AMT/DSST does, however, assert that Cox's spectrum proposal was inconsistent with that adopted in the Second Report and Order.

In order to set the record straight, Cox would note that, although its comments in GEN Docket No. 90-314 advocated licensed PCS assignments of 40 MHz, its preference request did not include a licensed bandwidth recommendation (as AMT/DSST concedes). Its preference request thus was not inconsistent with its PCS rulemaking comments. Moreover, the Commission ultimately provided for combinations of bandwidth which would permit a licensee to hold a 40 MHz PCS license, a result entirely consistent with Cox's rulemaking position on the need for adequate allocations for PCS licensees to become viable competitors. In other words, Cox's rulemaking comments were compatible with the result of the Commission's decision as was, more importantly, Cox's preference request (which contained no licensee allocation proposal). The Commission's treatment of Cox's pioneer's preference request was thus fully acceptable.

IV. CONCLUSION

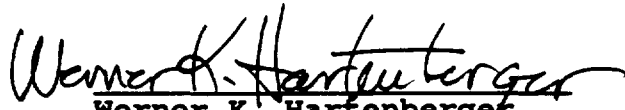
None of the petitions for reconsideration which were filed herein requests that the Commission withdraw Cox's pioneer's preference because Cox's proposal lacked technical merit or otherwise failed to satisfy the criteria for pioneer's preferences. The only request that Cox's preference be rescinded was made by ACT. As Cox has

demonstrated, ACT's allegations of ex parte violations are wholly unfounded. ACT's additional claims concerning the volume of ex parte presentations are similarly in error and do not alter the continuing baseless nature of its ultimate charge.

Cox Enterprises, Inc., therefore, respectfully requests that the Commission deny the petitions for reconsideration of the Third Report and Order insofar as they affect the grant of a pioneer's preference to Cox and to affirm that grant.

Respectfully submitted,

COX ENTERPRISES, INC.


Werner K. Hartenberger
Suzanne M. Perry
Laura H. Phillips

Its Attorneys

DOW, LOHNES & ALBERTSON
1255 - 23rd Street, N.W.
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April 21, 1994

Attachment A

**Letter to Andrew S. Fishel from Werner K. Hartenberger
(February 4, 1994)**

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February 4, 1994

VIA HAND DELIVERY

Mr. William F. Caton
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Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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FEB - 4 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: ET Docket No. 93-266
Gen. Docket No. 90-314

Dear Mr. Caton:

Enclosed are an original and nine copies of a letter written to Mr. Andrew S. Fishel for inclusion in the record in each of the above-captioned proceedings.

Please direct any questions to the undersigned counsel.

Sincerely,


Laura H. Phillips

LHP:vc
Enclosures

DOW, LOHNES & ALBERTSON

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February 4, 1994

VIA HAND DELIVERY

Mr. Andrew S. Fishel
Managing Director
Federal Communications Commission
1919 M Street, Room 852
Washington, D.C. 20554

Re: ET Docket 93-266;
Gen. Docket 90-314

Dear Mr. Fishel:

On January 26, 1994, Pacific Bell submitted a letter to you alleging violations of the Commission's ex parte rules by the three entities that received Pioneer Preferences: American Personal Communications ("APC"), Cox Enterprises, Inc. ("Cox") and Omnipoint. Cox, by its attorneys, hereby responds to the letter as it addresses Cox's actions.

The relationship of the Commission's ex parte rules to the Pioneer Preference rules is clear and unambiguous. At the time the preference rules were adopted the Commission considered the application of its ex parte rules to pioneer preference requests and preference awards.^{1/} The Commission expressly determined

1/ The Commission stated: "The petition for rule making, the request for a pioneer's preference, and any experimental license application will all be treated as separate proceedings, because of the differing ex parte requirements, although for convenience purposes they may be addressed by the Commission in a single document. Any experimental license application and the request for a pioneer's preference are adjudicative proceedings under our ex parte rules, see 47 CFR section 1.1202(d). Accordingly, upon the filing of a formal opposition, see 47 CFR section 1.1202(e), those
(continued...)

Mr. Andrew Fishel

February 4, 1994

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that ex parte contacts directed to the merits of a particular opposed preference proposal would be impermissible, but that no prohibited ex parte restriction should extend to related non-restricted rulemakings. The Commission established a set of parameters so as not to deprive the Commission of the generally acknowledged and publicly beneficial contacts with parties interested in the merits and outcome of a rule making proceeding that also involved a pioneer preference:

The restricted nature of a formally opposed request for pioneer's preference proceeding and any formally opposed experimental licensing proceeding would not limit ex parte presentations in the exempt petition for rule making proceeding on whether or not the proposed spectrum allocation is new and innovative and in the public interest. Ex parte presentations on who should or should not receive a pioneer's preference or experimental license would be prohibited, however. Pioneer Preference, 6 FCC Rcd at 3500, n.9.

Thus, when the Commission initiated a rule making in Personal Communications Service Docket No. 90-314, it was a non-restricted rule making. Cox documented its meetings with Commission staff by filing ex parte letters. Cox's involvement in Personal Communications Services ("PCS") dates from the Commission's earliest consideration of PCS in its Docket No. 90-314 Notice of Inquiry.^{2/} Cox consistently has supported the Commission's proposals to establish PCS as a service competitive to the telephone local exchange. Cox has demonstrated leadership and its success as a developer of cable-based PCS is a matter of record. Over the years Cox has filed extensive comments directed to the merits and the outcome of both the PCS rule making and its particular preference award. Cox has always, however, maintained a bright line between presentations to the Commission on non-restricted and restricted matters. Cox categorically denies any prohibited ex parte contacts were made by Cox or its representatives.

1/ (...continued)

matters will become 'restricted' proceedings in which ex parte presentations are prohibited. See 47 CFR section 1.1208(c). The petition for rule making to allocate spectrum will be an exempt proceeding under the ex parte rules, 47 CFR section 1.1204(a)(2)." Pioneer Preference, 6 FCC Rcd 3488, 3493 (1991).

2/ See Personal Communications Services, 5 FCC Rcd 3995 (1990) (Notice of Inquiry).

No Violation of Ex Parte Rules Occurred.

The allegations leveled at Cox are twofold. First, Pacific Bell claims that Cox's letter filed on September 28, 1993 did not contain sufficient proof of service, although Pacific Bell itself observes that copies were apparently sent to the parties in Gen. Docket 90-314.^{3/}

This allegation is devoid of merit. Cox's September 28 letter clearly provided on the signature page a list of parties served that included the Commissioners, Commission staff and the service list for Docket No. 90-314. The letter was filed with the Secretary's office on September 28 and copies are maintained in the Commission's public files. Pacific Bell seeks to raise an issue where absolutely none exists. Cox reaffirms its service of the September 28, 1993 letter.

In its second allegation, Pacific Bell asserts that Cox filed ex parte letters in ET Docket No. 93-266 in early November 1993 that indicate that Cox's representatives discussed "outstanding issues in the Commission's Pioneer Preference (sic)^{4/} Proceeding" with Commission personnel. Pacific Bell claims that, because Cox had not yet filed comments in ET Docket No. 93-266, those letters were not sufficiently informative of Cox's position on the main issue in Docket No. 93-266, the continuation or modification of the Commission's pioneer preference rules and policy.^{5/}

Pacific Bell acknowledges the "close nexus" between Docket Nos. 90-314 and 93-266 and generally restates the Commission's ex parte requirements that "[p]arties making ex parte contacts must list the subjects discussed and arguments presented to the extent they are not reflected in the party's previous written filings." While Pacific Bell

3/ See Pacific Bell letter at 2 fn. 4.

4/ Cox's ex parte letters actually said that it "discussed issues in the Commission's Pioneer Preference Notice Proceeding." (emphasis added)

5/ Pacific Bell claims that, since Cox had not filed comments in ET Docket 93-266, its position could not have been reflected in Cox's "previous" written filings. Further, Pacific Bell observes that "the letters offer no insight as to what 'arguments or data' were presented to support Cox's 'position'. Nor do they indicate what Cox's position was." Pacific Bell letter at 3-4.

Mr. Andrew Fishel
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admits that ET Docket No. 93-266 is a non-restricted proceeding,^{6/} it implies that any Cox presentation to the Commission staff must have involved the merits of individual pioneer preference applications. In fact, Cox's meetings with Commission staff were entirely consistent with the Commission's ex parte rules.^{7/}

It should require no great insight to infer from Cox's status as a tentative pioneer preference holder and its previous filings in related Docket No. 90-314 that Cox

6/ With regard to fn. 5 of PacBell's letter, there is nothing "ambiguous" about the Commission's Notice of Proposed Rulemaking in ET Docket No. 93-266. The Commission's statement that "many pioneer preference requests have been formally opposed, and in these proceedings, no ex parte presentations are permitted . . .," plainly means no ex parte presentations would be permitted concerning the pioneer preference requests and oppositions. Pacific Bells's strained interpretation of the Commission's reference to "these proceedings" (i.e. that the entire Docket No. 93-266 proceeding is transformed into a restricted ex parte proceeding), would remove all meaning from the Commission's totally unambiguous statement that ET Docket No. 93-266 is a "non-restricted notice and comment rule making proceeding."

7/ The Notice was a non-restricted rule making in every aspect save one. The Notice stated:

We note . . . that many pioneer preference requests have been formally opposed, and in these proceedings, no ex parte presentations are permitted until final Commission decisions regarding the preference requests are made and are no longer subject to reconsideration by the Commission or review by any court. Pioneer Preference Notice, 8 FCC Rcd 7692, 7695 (1993).

Every other aspect of the pioneer preference review, including whether any changes to the preference rules should affect the tentative preference holders, was non-restricted subject matter. Indeed, it was clear from Commission statements and the written record that the proceeding arose not from any misgivings regarding the merits of any particular preference request, but rather addressed the desirability of continuation of the preference policy generally and the effect of any rule changes to tentative preference designees.

Mr. Andrew Fishel
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avored continuation of the Commission's pioneer preference policies.^{8/} Further, it is disingenuous to suggest that Cox was not already on record supporting the continuation of the Commission's pioneer preference program. Cox's views on the public interest benefits of the Commission's preference policies were a matter of public record long before Cox's November meetings with Commission staff. Cox's later filed Comments and Reply Comments in ET Docket No. 93-266, and its November meetings with Commission personnel referred to in Pacific Bell's letter, merely reiterated the points made in Cox's previous written filings supporting continuation of the Commission's pioneer preference policy.

In a similar circumstance, the Commission recently ruled that two "Big LEO" applicants did not violate Commission ex parte rules by making oral presentations on a non-restricted rule making that addressed standards that would govern the industry as a whole, even though those presentations could have a dispositive effect on particular pending applications. The Commission's Acting General Counsel concluded:

We recognize that the resolution of these matters in the docketed proceedings will have an impact on the pending applications. This, however, is the case in any rulemaking proceeding relating to a service for which applications have already been filed. And, as recognized by the Commission in prior instances in which rulemakings were related to pending applications, this does not and should not render improper ex parte presentations regarding the policy issues raised in the rulemaking proceedings. We also believe that the general policy questions of spectrum, licensing and service rules for Big LEOs are clearly distinct from whether specific applications should be granted. Accordingly, we find that oral ex parte presentations by Motorola/Loral on the former set of issues were permissible under our rules.^{2/}

The Commission's Acting General Counsel correctly ruled in that case, and must in this, that no impermissible contact occurred and no Commission rules were violated.

8/ For example, in Docket No. 90-314, Cox filed comments on January 29, 1993 supporting the Commission's preference policy for service and technical innovation. See Comments at 2-4. Again in Reply Comments on March 1, 1993, Cox expressed support of the pioneer preference program. See Reply Comments at 4.

2/ Letter of Renee Licht, Acting General Counsel, to Robert A. Mazer, Jill Abeshouse Stern and Norman P. Leventhal, dated November 18, 1993 at 3-4 (citation omitted). A copy of the Commission's letter is attached.

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Pacific Bell's Baseless Allegations Demonstrate Anti-Competitive Motives.

Cox's preference award is in Pacific Bell's wireline region. Pacific Bell has initiated an elaborate spin-off of its cellular licenses to become eligible under the Commission's present restrictions to bid for a 30 MHz license. Pacific Bell has successfully prosecuted a waiver request to ensure that its incomplete spin-off will not affect its eligibility to bid for a 30 MHz MTA license.^{10/} Award of a license to Cox apparently is troublesome to Pacific Bell because there will be one fewer license in the Los Angeles-San Diego MTA available through the auction process. The Commission, of course, anticipated this result at the time preference rules were adopted.^{11/}

If Pacific Bell is successful in its bid for a 30 MHz license, it will face competition from Cox and other PCS licensees to be licensed in the Los Angeles-San Diego MTA. Pacific Bell obviously is piqued to face the prospect of competition from a party granted a license pursuant to the Commission's pioneer preference policy. However, Pacific Bell did not complain when it received its set-aside of in-region cellular licenses under circumstances more favorable than those available to non-wireline cellular licensees. Pacific Bell's attempt to raise baseless allegations of ex parte impropriety in this circumstance is the height of market exclusion and anti-competitive behavior, and is utterly frivolous.

Finally, assuming that there were any merit to its claims, Pacific Bell has not demonstrated the required promptness in bringing its allegations to the attention of the Commission. Its allegations were submitted months after the actual filings complained of and on the eve of release of the Commission's order finalizing PCS preferences. Pacific Bell has not asked the Commission to take any action on its filing, presumably because it realizes that its unsupported assertions provide no basis for further action, which suggests that Pacific Bell merely seeks to intimidate rather than inform the Commission.

10/ See Request by Pacific Telesis Group and PacTel Corporation of a Waiver of Section 99.204, (PacTel Waiver Order), FCC 94-8, released January 18, 1994.

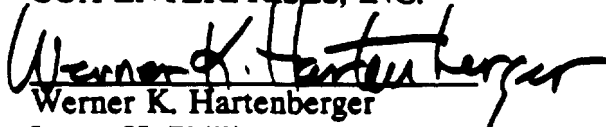
11/ See Report and Order, Establishment of Procedures to Provide a Preference, 6 FCC Rcd 3488, 3490-3492 (1991).

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Pacific Bell obviously is disappointed that Cox was granted a pioneer preference in its wireline region.^{12/} The time to raise substantive challenges to its selection, however, is long past. In any event, Pacific Bell's baseless claim of ex parte improprieties is utterly without merit and should be dismissed.

Respectfully submitted,

COX ENTERPRISES, INC.


Werner K. Hartenberger
Laura H. Phillips

Its Attorneys

cc: Brian F. Fontes
Byron F. Marchant
Karen Brinkmann
Robert Pepper
Thomas Stanley
William Kennard

^{12/} Pacific Bell in fact criticized Cox's designation as a tentative preference holder. See Comments of Pacific Bell, Gen. Docket No. 90-314, January 29, 1993 at 14-16. Its opinions regarding the merits of Cox's activities have already been considered and rejected by the Commission.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

November 18, 1993

IN REPLY REFER TO

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Dear Ms. Stern and Messrs. Mazer and Leventhal:

This responds to your letter dated October 14, 1993, on behalf of Constellation Communications, Inc., Ellipsat Corporation, and TRW, Inc. (hereinafter "petitioners"). You allege that Motorola Satellite Communications, Inc. ("Motorola") and/or Loral Qualcomm Satellite Services, Inc. ("Loral") violated the Commission's ex parte rules.

By way of background, your letter relates to three pending proceedings: (1) a rulemaking proceeding to allocate spectrum for low earth orbital satellite service (so-called "Big LEO" service) (ET Docket No. 92-28)¹; (2) a negotiated rulemaking proceeding that has been initiated preliminary to a rulemaking proceeding regarding licensing and service rules for Big LEO service (CC Docket No. 92-166)²; and (3) mutually exclusive applications for Big LEO

¹ See Notice of Proposed Rule Making and Tentative Decision in ET Docket No. 92-28 (Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, Including Non-Geostationary Satellites), 7 FCC Rcd 6414 (1992).

² See Public Notice "FCC Asks for Comments Regarding the Establishment of an Advisory Committee to Negotiate Proposed Regulations," CC Docket No. 92-166, 7 FCC Rcd 5241 (1992).